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In The

Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH CAMPISANO,
PETITIONER

VS.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STEVEN H. GIFIS
ATTORNEY FOR PETITIONER
ONE PALMER SQUARE
PRINCETON, NEW JERSEY 08540
(609) 921-0335

STEVEN H. GIFIS
OF COUNSEL AND
ON THE PETITION

ALAN DEXTER BOWMAN
ON THE PETITION

THE SUPERIOR APPELLATE PRINTING COMPANY
P. O. BOX 363
CRANBURY, N.J. 08512
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QUESTIONS PRESENTED

1. Whether a court commits plain error in a welfare and severance fund mismanagement prosecution under 18 U.S.C.A. Sec. 1954 when it admits evidence of non-covered treasury funds and erroneously instructs the jury that mismanagement of those funds is violative of the statute underpinning the prosecution?
2. Whether this Court should fashion a standard of care relating to recognition in fund mismanagement prosecutions of covered funds and appropriate circumscription of the evidentiary use of non-covered funds?
3. Whether a reversal is required in a fund mismanagement prosecution in circumstances where it cannot be determined that the conviction is based on mismangement of covered funds?
4. Whether a special interrogatory which instructs a jury to issue a guilty verdict upon certain findings may properly be submitted to a jury in a criminal case prior to the return of a general verdict?

5. Whether the special interrogatory submitted to the jury in the instant case tended to direct a verdict of guilty and misfocus the jury's attention upon the solicitation or receipt of a loan as the sole element of the offense of fund mismanagement vitiating the clear necessity that it relate any such act to an intent to be influenced respecting management of the funds?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 5, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is entitled **United States v. Palmeri**, and is as yet unreported. It is reproduced in the Appendix hereto as Appendix A.

JURISDICTION

The jurisdiction of the Supreme Court to review the final judgment of the United States Court of Appeals for the Third Circuit is based on 28 U.S.C. § 1254(1).

ORDER DENYING PETITION FOR REHEARING AND ORDER EXTENDING TIME TO FILE PETITION FOR CERTIORARI

A timely petition for rehearing was filed with the United States Court of Appeals for the

third Circuit and denied by order entered on October 27, 1980. Thereafter, an application was made to Associate Justice William Brennan, Jr. seeking an extension of time within which petitioner could timely file the within petition for certiorari. On December 15, 1980, Justice Brennan entered an order extending petitioner's time to petition this Court for certiorari until January 25 1981. The order of the Third Circuit denying rehearing is appended to this petition as Appendix C. Justice Brennan's order extending the period for filing is appended to this petition as Appendix D.

CONSTITUTIONAL, STATUATORY RULE PROVISIONS INVOLVED

Petitioner seeks review of issues of law arising under 18 U.S.C.A. §1954 and the Sixth Amendment to the United States Constitution. They are appended to this Petition as Appendix E.

STATEMENT OF THE CASE

I

Factual Background

A. The Racketeering Conspiracy And Its Alleged Object

Petitioner Joseph Campisano was indicted and convicted of alleged involvement in a racketeering conspiracy; racketeering; mismanagement of the assets of a union employee welfare plan and making a false statement in a loan application. Petitioner was jointly tried with Ernest Palmeri Sr., Vito Cariello, Frank Smith and Flen Chestnut. Petitioner and each of the codefendants are employed either as an officer or agent of Teamster's Union Local 945. Petitioner is president of the local. The indictment alleged, in essence, that petitioner and the others participated in a "loans for deposits" scheme involving corrupt placements of union welfare funds. Such a scheme entails the extension by banks of loans to union officials, directly or indirectly, in return for deposits of union funds within those banks. Federal law proscribes solicitation or receipt of anything of value in return for an agreement to be influenced in decisions respecting

employee welfare plan funds. The indictment alleged that petitioner and others received such loans in return for actions which petitioner took toward placement of union funds in particular banks. The indictment further alleged that petitioner falsified an application for a loan for the sum of $5,000.

The evidence of criminality presented against Petitioner at trial was scant and ambiguous. The indictment listed 135 overt acts. Petitioner was mentioned in only 10 of those 135 acts. The evidence merely established that petitioner, in his capacity as president of the local and trustee of employee welfare and severance funds, met with representatives of various banks; expressed his support for the revitalization of a restaurant on union premises and signed five union treasury fund checks to be deposited in certain banks. A total of eighteen checks were admitted into evidence. Apart from the union treasury fund checks, petitioner did not sign any of the other 13 checks introduced into evidence. The evidence also indicated that in his capacity as a friend and associate, petitioner vouched for

the financial responsibility and character of a union employee who was seeking a loan (codefendant Chestnut). And, consistent with his responsibilities as a father and family provider, that petitioner applied for and received a $5,000 loan which he is alleged to have falsely stated was intended to be used to finance his son's college education.

B. The Erroneous Assumption At Trial That Wholly Legal Acts Of Petitioner Were Criminal And Could Form The Basis For A Finding Of Sec. 1954 Violations And Serve As Racketeering Acts Within The Scope Of Sec. 1962(c)

a.

The Scope of Sec. 1954

The racketeering enterprise which underpinned the instant prosecution was predicated exclusively on violations of 18 U.S.C.A. Sec. 1954. That statute is specifically intended to proscribe mismangement of "any employee welfare benefit plan or employee pension benefit plan." 18 U.S.C.A. Sec. 1954(1). The statute states inter alia:

> ...As used in this section, the term (a) 'any employee welfare benefit plan or employee pension

> benefit plan' means any employee welfare benefit plan or employee pension benefit plan, respectively, subject to any provision of Title I of the Employee Retirement Income Security Act of 1974.

It is beyond dispute as was conceded by the government on appeal that Congress intended to limit the scope of the statute to protection of pension and welfare funds. Cf. 1970 U.S. Code Cong. and Adm. News, p. 4007.

Therefore, the essential element of a "loans for deposits" scheme which violates Sec. 1954 is that the deposits of union funds be drawn on either a union welfare or severance fund. However, the scheme alledged in the indictment related to three different funds without meaningful distinction: the union's welfare fund, the union's severance fund and the union's own treasury. In all, as previously noted, some eighteen checks were introduced at trial of which only five bore petitioner's signature. All five of these checks were drawn on funds outside the scope of Sec. 1954, namely, the union's treasury.[1] In the indictment and at trial the parties

---

1. Treasury funds are comprised exclusively of (cont'd)

and the court treated the union treasury checks as equally evidential of petitioner's liability under Sec. 1954. On Appeal petitioner argued and the government conceded that the statute did not extend to union treasury checks but only to welfare and severance funds. The distinction between treasury checks and covered funds checks was not perceived by any party at trial, including the court.

b.

Intermingling Of The Non-Covered Funds At Trial

Count Four of the indictment charged that petitioner solicited a loan for codefendant Chestnut in August 1974 from the Bank of Bloomfield. The indictment alleged that petitioner acted because of or with the intent to be influenced respecting decisions relating to the union welfare fund. The Chestnut loan was also alleged as the first act of racketeering participated in by petitioner. Petitioner did not at any time sign a check drawn on the welfare fund. He had no authority to do so. Count Seven charged petit-

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Cont'd
dues paid by members of the union.

itioner with solicitation of a loan on behalf of the Coterie, Inc., a restaurant to be established on union premises, in January and March of 1975. The Bank of Bloomfield issued a $125,000 loan to the Coterie, Inc. on March 18, 1975. This loan constituted the second act of racketeering allegedly engaged in by petitioner. This loan was also allegedly solicited because of or with the intent to be influenced respecting decisions as to management of the Welfare Fund. Union funds were deposited in the Bank of Bloomfield on June 20, 1974 and July 12, 1974. Both deposits predated the Chestnut and Coterie, Inc. loans. The June deposit was made by codefendant Cariello with a check drawn on the Welfare Fund. That check was used to purchase a $100,000 certificate of deposit. The July deposit was made by petitioner and codefendant Cariello. The check, utilized to purchase a $100,000 certificate of deposit, was drawn on the union treasury and was, therefore, from a fund outside the scope of Sec. 1954. The jury was not instructed that this check was not to be considered as within the scope of Sec. 1954. Indeed, as will be discussed, infra, the court

and prosecutor indicated to the jury that these funds were governed by the statute. Based on these deposits and loans, the jury concluded that defendant Campisano twice violated Sec. 1954 and, accordingly, committed two acts of racketeering.

Count 10 charged petitioner with receipt of a $5,000 loan from the State Bank of Chatham. That loan was allegedly received because of or with the intent to be influenced respecting management of the Welfare Fund. It also constituted an alleged third act of racketeering. The loan was allegedly solicited and issued on April 2, 1974. On December 13, 1973 and March 15, 1974 petitioner and codefendant Cariello issued checks to purchase certificates of deposit from the State Bank of Chatham of $20,000 and $80,000 respectively. The checks were drawn on union treasury funds. Petitioner was not alleged to have participated in any other deposits in the bank. The jury was not instructed that the funds were outside the scope of Sec. 1954. In August of 1974 codefendant Cariello purchased a $100,000 certificate of deposit from the State Bank of Chatham with a Welfare Fund check. Petitioner was con-

victed of a third Sec. 1954 violation and accordingly, a third act of racketeering on the basis of this evidence.

c.

Misuse Of The Wholly Legal Acts By The Court And Prosecutor

The treasury checks, which are wholly outside the reach of the statute, were not presented in a neutral fashion but were offered as affirmatived evidence of petitioner's guilt on Counts Two, Four, Seven and Ten. In its opening the government stated to the jury:

> Now, during the period referred to in the indictment, Local 945 maintained a Welfare Fund and a Severance Fund. You will hear evidence that the Welfare and Severance Fund were comprised of hundreds of thousands of dollars derived from contributions from owners of companies on behalf of their workers who were members of Local 945. And that the Welfare Fund was for the hospital and health care of the members of Local 945 who had lost their jobs.
>
> Additionally, you will hear that the union itself maintained an account of hundreds of thousands of dollars, which monies were derived from contributions from the workers themselves who were embers of Local 945. And in light

> of the fact that these funds I have just mentioned were comprised of hundreds of thousands of dollars, they would be invested in various ways to make money to increase the size of the funds. And these financial transactions that is, these investments, you will hear affected interstate commerce.

The government further stated that guilt of the "racketeering acts" could be predicated on a finding that "individuals who maintain a position with the union and/or its welfare and severance funds...solicit or receive loans for themselves... in exchange for depositing the assets..." The government contended that it would prove receipt of "$800,000 in loans and kickbacks" in exchange for depositing $1,200,000 from Local 945, the Welfare Fund and Severance Fund." More importantly, the government erroneously claimed that "Joseph Campisano, too, issued a check from Local 945 or its Welfare and Severance Fund and had it deposited at the bank where Palmeri represented the deposits would be coming." Moreover, the government represented, without distinctions as to covered funds, that the Coterie, Inc. loan "was granted because of the deposits from

the union." And, the jury was specifically requested "to look beyond the testimony of the bankers and rely on the documentary evidence," which as to petitioner consisted entirely of the treasury checks signed by him. Those checks were the exclusive documentary evidence adduced against petitioner.

In addition, the government prefaced its summation by stating "we are talking about these defendants utilizing the assets of Local 945 and its Welfare Fund and Severance Fund to obtain loans and kickbacks." The government characterized the evidence necessary for convictions of the Sec. 1954 violations charged in Count Two as "loans...in exchange for deposits of Local 945 and Welfare Fund and Severance Fund."

In its instructions to the jury, the court adhered to the overboard interpretation of the statute upon which the government based its case. The court categorized the harm as use of "the assets of Local 945 and the Welfare Fund and Severance Fund." Of greater importance is the instruction as to satisfaction of the jurisdictional requisite of the racketeering charge that inter-

state commerce be affected by the offense in question. (Sec. 1954). The court stated that this element could be satisfied by finding that "any check drawn on the account of Local 945...traveled out of State." Moreover, in its specific instructions concerning the elements of Sec. 1954, the court stated the funds covered were "the funds of Local 945 or its Welfare or Severance Fund."

d.

Resolution Of The Issue By The Third Circuit Court Of Appeals

Petitioner urged on appeal that he was convicted under the indictment on the strength of evidence which did not properly form a basis for the charges. The Third Circuit dismissed this serious attack on the convictions by noting that no objection had been raised by counsel and that the court's instructions which were erroneous at least in part were not so seriously misleading as to warrant a reversal under the plain error standard of review. The Third Circuit adopted petitioner's unchallenged representation that the trial court was unaware that the funds were not

covered by Sec. 1954 but nevertheless concluded that the trial court "emphatically distinguished the welfare and severance funds as the two accounts to which Sec. 1954 would apply." We emphasize that this conclusion was reached despite the Third Circuit's acknowledgements that the trial court intermingled the non-covered funds in instances and at no time stated that treasury funds were not covered by Sec. 1954. In this context, the Court of Appeals incredibly held that despite its misapprehension as to the scope of Sec. 1954 the court was able to impart to the jury "a clear impression that only money from the welfare and severance funds was relevant to the Sec. 1954 allegations."

As importantly, the Third Circuit omitted any reference to the affect of the prosecutor's statements and conduct in relation to consideration by the jury of the treasury checks. As noted, the checks were used offensively and were offered as affirmative evidence of guilt on the racketeering counts. The Third Circuit made no mention of the fact that the trial court at no time

limited the prosecutor's use of the evidence and dismissed petitioner's claim that the omissions in its instructions acted to corroborate the prosecutor's statements. Petitioner posited to the Third Circuit that since he was named in only three of the forty-six acts of racketeering and with only two of the banks, the strongest evidence of his complicity were the checks that he signed (five out of eighteen). It is, in petitioner's view, inconceivable to suggest that those documents involving mismangement of union funds did not contribute significantly to the jury's assessment of his guilt.

The Government's response in the Third Circuit to the erroneous inter-mixing of covered and non-covered deposits besides that no one noticed or objected was that the checks were proper evidence of petitioner's participation in the conspiracy. In support of this the government noted that in the indictment itself in Count I, paragraphs 3 and 4 the Grand Jury charged that:

> 3. It was a part of said conspiracy that the defendants would utilize the assets of Local 945

> and the Welfare Fund and Severance Fund...[to receive loans, etc.](emphasis added).

The government further noted that the treasury checks were all mentioned in various overt acts and observed that overt acts need not be criminal. That point of law was conceded. But, as was argued below, in including the placing of treasury funds as part of the conspiracy the Grand Jury in effect charged that the use of the treasury checks in this manner was a crime. Put otherwise, the import of paragraph 3 of the indictment was that one of the criminal objects of the "loans for deposits" scheme was the use of treasury funds to receive loans and other consideration from the banks. In doing so it is submitted that the Grand Jury charged the defendants with an object of the conspiracy which was not a crime. In accepting the indictment prepared by the government, the Grand Jury set the stage for the confusion which followed. This permitted the prosecutor in his opening and summation to inter-mix the two classes of checks and to paint the conspiracy as directly including as

its object the misuse of all of the assets of the union; it likewise permitted the trial court to charge in the same misguided vein.

The Third Circuit responded to this argument in footnote 6 of its opinion by noting that the "part of the conspiracy" language of the indictment is better understood as a overt act than an admittedly improper "lawful object" as was urged by the petitioner. Since the indictment contained a specific paragraph devoted to a detailing of all of the overt acts alleged in the indictment, this reading is totally unjustified. Moreover, it is not consistent with the parties and the court's conceded assumption that the substantive Sec. 1954 counts could be proven by the deposits of the union's treasury checks.

C. Erroneous Submission To The Jury Of A Special Interrogatory Prior To The Return Of A General Verdict

a.

The Form Of Special Interrogatory Utilized

At the conclusion of the trial court's instructions, and prior to the return of a general verdict, the jury was given a form of special in-

terrogatory which it was required to complete.[2] The form required the jury to record its findings as to each of 46 predicate acts upon which guilty verdicts pertaining to particular defendants could be based on the racketeering count. The jury was instructed, over a clear defense objection and a fortiori without any explicit defense consent, to make special written findings as to each defendant on each of the 46 racketeering acts to which their individual names were linked in the

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2. The trial court was attempting to avoid the problem experienced in United States v. Dansker, 537 F.2d 40 (3 Cir. 1976), cert. den. 429 U.S. 1038 (1977). In Dansker a conviction for conspiracy to violate the Travel Act was reversed because one of its alternative objects was found to be non-criminal by this Court. Likewise in a RICO prosecution reversal was required when the jury was not clearly informed as to the scope of a conspiracy and made no special findings to permit the appellate court to determine whether their verdict was based on conduct before or after the effective date of the RICO statute. United States v. Brown, 555 F.2d 407 (5th Cir. 1977). The trial court was attempting to avoid a retrial herein in the event that part of the complex RICO counts was determined to be improperly presented to the jury. His use of special interrogatories would have facilitated appellate review. As is noted herein, that purpose could have been adequately accomplished by the submission of such questions after the jury returned an unfettered and uninfluenced general verdict of guilty.

indictment. Only three of those 46 acts were alleged to relate to petitioner. The 46 acts were 45 loans and one kickback allegedly received by petitioner or others. A finding of two or more guilty acts within that list compelled a finding of guilt as to that defendant upon the racketeering count and by logical inference upon the inchoate racketeering conspiracy and false statement violations.

With specific reference to the form of the special interrogatory, it listed the 45 loans and one kickback allegedly received by the defendants and others in connection with deposits of the funds. The special interrogatory, categorized by the court as a "verdict form," contained a listing of the name of each defendant across the top and directly beneath it, in numerical sequence, the acts of racketeering, namely the loans alleged to have been received or solicited by that defendant. Two or more findings of complicity beneath a defendant's name required that the jury declare him guilty of racketeering. This instruction was

written across the top of the form.[3]

b.

The Tendency Of The Special Interrogatory To Misfocus The Jury's Attention Upon A Single Element Of Sec. 1954

The special interrogatory which was submitted to the jury prior to the return of a general verdict instructed the jury to return a verdict of guilty on the racketeering charge (Sec. 1962(c) upon a finding that the particular defendant was involved to any degree, however slight, in two acts of receiving, agreeing to receive or

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3. The form stated inter alia:

In reaching a verdict on Count 2, you must first decide whether or not each defendant committed two or more acts of racketeering. Forty six acts of racketeering are alleged in the indictment. A space is provided alongside the number corresponding to each act of racketeering. ..record your verdict as to each defendant charged with committing that act...

Acts of Racketeering	Ernest G. Palmieri	Joseph Campisano	Vito Cariello
1			
2	___		___
3	___		___
etc.	___	___	___
	etc.	etc.	etc.

(cont'd)

soliciting the particular loan or kickback. Such a finding only proved one aspect of the predicate offense. (Sec. 1954). The instructions printed on the form did not require a finding as to the alleged acts evidencing that the particular defendant acted because of or with the intent to be influenced with respect to management decisions relating to the welfare fund and severance fund. Succinctly stated, the special interrogatory misfocused the jury's attention upon conduct

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Cont'd

Acts of Racketeering	Flen Chestnut	Frank Smith
1		
2		
3		
etc.	etc.	etc.

The 46 alleged acts of racketeering were charted in the indictment with the names of the defendants alleged to have participated in that act linked together. The defense also strenuously objected to submission of the chart to the jury. Counsel noted that read in pari materia the charge and special interrogatory constituted a score card which unduly highlighted the government's case and misfocused the jury's attention upon a single element of Sec. 1954. An example of a charged transaction is set forth below:

Approx. Date	Amount	Borrower's Name	Defendants involved
1. 5/31/74	$15,000.00	Ernest Palmeri	Palmieri, Cariello,
etc.	etc.	etc.	etc.

relating solely to the loans and kickbacks. In this respect, the form incorrectly instructed the jury that it was not required to scrutinize petitioner Campisano's decisions with respect to management of the funds. Therefore, the form used in this case acted to supplant the court's instructions with an incorrect statement of applicable law.

c.

Articulation By The Third Circuit Of Its Support For The Submission Of Special Interrogatories To A Jury Prior To A General Verdict

In his appeal to the Third Circuit Court of Appeals, petitioner argued that the special interrogatory procedure utilized in his criminal trial was a patent and gross violation of his right to trial by jury because it directed a verdict of guilty. Petitioner argued that the right was further violated because the form misdirected the jury's attention upon the loans thereby negating the court's instruction that the jury relate the loans to decisions that petitioner may have made in his capacity as trustee of the welfare or severance funds, such as by placing, recommend-

ing or promising deposits in exchange for those loans. In an opinion which is contrary to the prevailing law in the federal circuits and compromises prior pronouncements by this Court, the Third Circuit ruled that the trial court did not err in submitting a form of special interrogatory to the jury prior to the return of a general verdict.

In upholding the procedure below, the court chose language which encourages this practice in criminal cases. The court stated that it found "no error in the use of special interrogatories in this complicated criminal case." Indeed, every circuit court of appeals which has passed on this question has ruled against special verdicts in one context or another and all circuits have positively discouraged their use, especially before the return of a general verdict. On the same day that the panel opinion was entered herein, a panel of the Sixth Circuit Court of Appeals reversed a murder conviction because of the use of a special verdict form that correctly stated the law but which the court found may have mislead the jury or reduced the govern-

ment's burden of proof. See United States v. Wilson, ___F.2d__(6 Cir. 1980). Both evils were present in the instant case but the panel not only validated the use of the special verdict form but, as was previously noted, actually encouraged the use of such forms in future trials of multiple defendants and multiple courts.[4]

ii

The Jurisprudential Significance Of The Arguments To Be Raised Before This Court

Petitioner herein has selected two issues to be raised before this Court. Those issues relate to: (1) the failure of the court to properly circumscribe the use of the non-covered treasury fund checks and (2) submission of a form of special interrogatory to the jury prior to the return of a general verdict. We believe that it is undeniable that each of these issues has national

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4. This encouragement of special interrogatories, however, was actually in dictum since the panel erroneously concluded that the objection at trial was inadequate and, because of the absence of an objection in a post-trial motion for a new trial, that the issue was not cognizable on appeal. The panel cited no authority for this concept of waiver and indeed no such authority exists.

significance in the context of the development of fair and uniform trial procedures designed to ensure the constitutional integrity of verdicts in criminal cases. These claims are outlined below and detailed at length in the reasons for granting the writ.

A. The Issue As To Non-Circumscription Of The Funds Covered By Sec. 1954

As is demonstrated by the facts of the instant matter, there appears to be a precedential void respecting the standards of care required to be exercised in fund mismanagement prosecutions to ensure that convictions are based on legal evidence. The circumstances below indicate that potentially there have been many such cases wherein criminal defendants have been convicted of misappropriation or mismanagement offenses on the basis of acts relating to funds which are not covered by the applicable statute. Indeed, at the trial below neither the court, prosecutor nor the defense attorneys correctly perceived the scope of Sec. 1954. There are no published cases establishing a standard of particularity which mandates care in this regard. But for recognit-

ion of this issue by appellate counsel, petitioner would be among those who were convicted of crime on the basis of wholly legal acts in the context of a fund mismanagement case without any challenge to the impact of intermingling upon the jury. Trial courts must be alerted in a clear statement by this Court that supervisory powers must be exerted to ensure that a proper focus is maintained in fund mismanagement cases. The court is the ultimate guarantor of a fair trial. The interests in fairness to criminal defendants requires no less. As importantly, prosecutors and defense attorneys must also be advised.

The necessity of articulation of this standard of care is clear from a further aspect of the instant action. The instant indictment arose as part of a RICO prosecution. The reach of the racketeering statute is the subject of much controversy and it cannot be gainsaid that this Court will be called upon to settle the dispute. Similar to the early criticism of the law of conspiracy, viz. that it permitted the government excessive and unwarranted opportunity to secure a conviction, detractors of the RICO statute have

argued that it has provided the government with an unfair means to essentially legislate criminality by its every-expanding use of the statute.[5] With reference to the instant case, violations of Sec. 1954 are racketeering acts. Two or more such violations constitutes an independent violation of the RICO statute. Thus, for these reasons, improper failure to circumscribe the funds covered by a particular statute may result in two unfounded convictions. That was the result below.

Aside from the national significance of this issue, we emphasize that the most salient consideration is that petitioner was denied his right to a trial by jury. Unless this Court grants him relief from an unsound conviction, he becomes the

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5. See, e.g., United States v. Anderson, __F.2d __(8th Cir. 1980); United States v. Sutton, __F.2d __(en banc) aff'g 605 F.2d 260 (6th Cir. 1980); United States v. Turkette __F.2d __(1st Cir. 1980), Pet. for Cert. filed by the United States, November 19, 1980, 28 Crim. L. Rep. 4136 (12/17/80). All of these cases discuss the question of whether a RICO prosecution can be founded upon an "enterprise" that is wholly illegal in nature. The majority of the federal circuits have answered in the affirmative as in Sutton while the Eighth and First Circuits have answered the question in the negative. It is probable that this and many (cont'd)

victim of injustice. This Court can vindicate petitioner's right to a constitutionally fair trial and protect others from similar problems. In this way, an open seam in the fairness and reliability of criminal trials pertaining to fund mismanagement will be repaired.

B. The Issue As To Submission Of The Special Interrogatory

The Third Circuit in its opinion expressed unprecedented support for submission of special interrogatories to a jury in a criminal trial even where they are used without consent of the defendant prior to the return of a general verdict. Such a practice, as is recognized by all federal circuits and most state jurisdictions, is fraught with inherent detriment to a criminal defendant's right to a jury trial. In encouraging use of such devices, the Third Circuit has established perilous precedent and perhaps spearheaded a movement toward widespread experimentation with such devices. Any such device, because it tends

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other interpretive questions will confront this Court as the Government elects more and more to rely upon the RICO statute.

to direct a verdict in a criminal trial, is violative of the right to trial by jury in the most egregious manner. The major problem with experimentation is that it is often difficult to conceptualize the actual affect of such devices and many criminal defendants will be required to bear the expense of trials infected with error. In this context, the Third Circuit found that it was permissible below especially due to the complexity of the trial. That Court did not comprehend the affect of the device. In its analysis, the Court misperceived that the special interrogatory was nothing more than a verdict form since in its view it can be anticipated that a jury will "note its prior determinations even absent special interrogatories, and refer to these notations when reaching a verdict." (Appendix A- 42a). The Third Circuit failed to apprehend that such informal notations need not be turned in to the court at the end of deliberations and may be wholly disregarded by the jury in the exercise of its historic powers. A jury which is constrained to report its findings is under pressure to explain any deviation from those findings in the exercise

of its recognized power of lenity. Therein lies the greatest evil of special interrogatories. Those devices encroach upon the jury's absolute independence to exert its will.

This Court should examine the device utilized below, in light of the Third Circuit's clear misconception of it, and issue a statement as to the role to be served by interrogatories in criminal trials. The device below required that the jury report its factual findings to the court and that it render a particular verdict in the event of certain findings. Such a result is absolutely improper in a criminal trial. And, it is submitted, may never be used in any case prior to the return of a general verdict of guilty except by explicit consent of the defendant.

REASONS FOR GRANTING THE WRIT

POINT I

CERTIORARI SHOULD BE GRANTED TO ESTABLISH A STANDARD OF CARE RELATIVE TO RECOGNITION IN FUND MISMANAGEMENT PROSECUTIONS OF COVERED FUNDS AND APPROPRIATE CIRCUMSCRIPTION OF THE EVIDENTIARY USE OF NON-COVERED FUNDS AND TO PROVIDE RELIEF TO PETITIONER FROM CONVICTIONS WHICH ARE BASED ON WHOLLY LEGAL ACTS. WITH RESPECT THERETO, THIS COURT SHOULD EMPHASIZE FOR THE PURPOSES OF SOUND PRECEDENT THAT A COURT COMMITS PLAIN ERROR WHEN IT PERMITS ADMISSION OF NON-COVERED FUNDS AND INSTRUCTS THE JURY THAT MISMANAGEMENT OF THOSE FUNDS MAY BE CONSIDERED AS SUBSTANTIVE EVIDENCE OF GUILT OF MISMANAGEMENT OF THE FUNDS ACTUALLY COVERED BY THE STATUTE

The indictment alleged that petitioner participated in three violations of Sec. 1954 (Counts Four, Seven and Ten). A finding of two or more violations of Sec. 1954 required that he be convicted of a violation of Sec. 1962(c) (Count Two). The acts adduced by the government to prove the Sec. 1954 violations consisted of evidence pertaining to the receipt, agreement to receive or solicitation of three loans and five

checks signed by petitioner which were used to purchase certificates of deposits. Sec. 1954 proscribes receipt or solicitation of loans because of or with the intent to be influenced respecting management of particular funds. The loans were intended as proof of the first component of the offense and the checks were intended to establish the second component. The checks signed by petitioner were drawn upon funds which are not covered by Sec. 1954.

The jury was at no time informed that the checks signed by petitioner were outside the scope of Sec. 1954. Assuming the relevance and admissibility of the checks for some other purpose, namely as proof of participation in the conspiracy, the government was obliged to restrict its affirmative use of the checks to that count. More importantly, the court was required to ensure that consideration of the evidence was properly circumscribed. At trial, both the court and the prosecutor failed in their respective responsibilities. As was conceded by the government on appeal, Sec. 1954 is limited to conduct in management of the Welfare Fund and Severance Fund. See

United States v. Richards, 583 F.2d 491, 495 (10 Cir. 1978). There can be little doubt that the convictions of petitioner under Sec. 1954 were obtained on the basis of mismanagement of funds outside the statute since there was no evidence that he mismanaged any fund other than non-covered treasury funds. As related to Sec. 1954, the deposits of checks drawn on the union treasury were wholly legal acts. And, because the court instructed the jury and the prosecutor argued that mismanagement of the non-covered funds established liability under Sec. 1954, without any opposition by defense counsel, this conclusion is irrefutable. The error as to the proper utility of the treasury fund checks resulted in convictions of petitioner under Sec. 1954 on the basis of acts which under that statute are wholly legal acts. Further, it is clear that the jury's deliberations as to the racketeering and conspiracy charges are rendered nugatory because of this error. Simply put, the findings of guilt upon the Sec. 1954 counts, which were predicated on an erroneous premise as to the scope of the statute, compelled a guilty verdict upon the

racketeering and conspiracy charges.

A. The Trial Court Committed Plain Error In Permitting Acts Outside Sec. 1954 To Serve As Proof Of An Essential Element Of The Offense.

The trial court's failure to properly limit the scope of the jury's consideration of the treasury checks to the conspiracy count and to specifically state that the checks were inadmissible as to the Sec. 1954 counts was clearly plain error. That failure, which permitted the jury to consider the checks as substantive evidence of guilt under Sec. 1954, amounted to the failure to charge that a necessary element of Sec. 1954 was a finding that any evidence underpinning a conviction on that count relate exclusively to the Welfare or Severance Fund. Guilt of an offense must be proven by evidence within the applicable statute. It is the court's responsibility to ensure that the jury comprehends the exact nature of the evidence. United States v. Harris, 347 U.S. 612, 613 (1977); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1930).

Petitioner's convictions were based exclusively on the jury's misapprehension as to the scope of the applicable statute. This misapprehen-

sion stemmed from the trial court's failure to correctly instruct it as to the law. Error which results in conviction of a crime on the basis of acts which are not proscribed by the applicable statute is error of the most fundamental and egregious nature. See, United States v. Beeler, 587 F.2d 340, 343 (6 Cir. 1978). In Beeler, the Court reversed stating that a trial court cannot permit a defendant to be tried on charges that are not made in the indictment against him. The Beeler Court stated that this infirmity may not be waived by a failure to object. Id. Sec. 1954 does not assert, as is written in the indictment (and acknowledged by all parties at this point) that mismanagement of union treasury funds was a violation of the statute. The court's failure to limit consideration of those checks to the conspiracy count, coupled with the comingling of those funds in the instructions it did give and the prosecutor's obvious theory and remarks in support, thereof, resulted in petitioner being tried and convicted essentially on charges that were proved with evidence of acts which were not criminal.

United States v. Brown, 555 F.2d 407, 420 (5 Cir. 1977), is particularly apposite. In Brown the Court found plain error where the jury was not clearly informed as to the scope of the essential elements of a conspiracy to racketeer. The jury was not informed of the effective date of the racketeering conspiracy statute nor that a guilty verdict could not be returned unless the Government demonstrated that the conspiracy extended beyond that date and the accused was a member of it at that time. 555 F.2d supra at 419. The defendants in Brown, therefore, were convicted on the basis of evidence that was not considered under a correct interpretation of the statute. The jury, like that in the instant case, was presented with an over-broad interpretation of the statute.

The Brown Court held that the jury instructions allowed the defendants to be convicted for "acts...which were innocent when done." Id. at 420. The error, in the view of the court, required reversal of the conspiracy conviction. The court stated that it could not draw the conclusion that the convictions on the choate racketeering charges indicated that the conspiracy existed af-

ter the effective date and that the defendants were members. The court rejected that argument and stated "for us to draw such a conclusion would be, in effect, to direct a verdict for the government on a material issue of fact." Id. at 420. The court reasoned that although a finding of the alleged acts of racketeering is consistent with the existence of a conspiracy, it did not establish that those convicted participated after the effective date. The government had argued that the implication of a jury finding of a post-effective date racketeering act "ended the inquiry" as to prejudice and was sufficient to save the conspiracy convictions. The Brown Court disagreed stating that "no inference legitimately may be drawn from the guilty verdicts." Id. at 421.

In the instant case, it is clear, despite the Third Circuit's ruling to the contrary, that the evidence underpinning the Sec. 1954 counts was wholly defective. Those three counts also mirror the racketeering acts alleged in Count Two. Therefore, those counts are also infected with error. In sustaining the convictions, the Third Circuit essentially "directed a verdict on a

material issue of fact," namely whether the jury found that the loans related to funds covered by the statute. See, United States v. Brown, supra. Under no circumstances consistent with due process may petitioner's convictions on the basis of evidence outside the statute be sustained. In this context, the Third Circuit affirmed a blatant violation of due process. See, United States v. Harriss, supra; Lanzetta v. New Jersey, supra.

United States v. Dansker, 537 F.2d 40 (3 Cir. 1976), cert. den. 429 U.S. 1038 (1977), is also instructive. The defendant in Dansker were charged under the Federal Travel Act, 18 U.S.C.A. Sec. 1952. That statute incorporated violations of the bribery statutes "of the State in which committed," Id. at 47. The government alleged and proved what it believed to be a violation of state law as part of its prosecution under the Federal statute. The defendants in Dansker maintained that the government adduced insufficient evidence of commission of a state law violation, having proceeded under an incorrect interpretation of the statute. The court agreed with defendants and entered a judgment of acquittal

on the count which required proof of the State law violation. The Dansker Court stated:

> Our construction of the pertinent New Jersey bribery statute differs greatly from that pressed upon us by the government...In view of the government's erroneous interpretation of the relevant law, it is not surprising that the evidence adduced below...is insufficient to sustain a conviction. [Id. at 50]

The Dansker Court also vacated a conspiracy conviction which had two alternative objects, one of which was the bribery analyzed under State law, the other object being a bribe under Federal law.[6]

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[6] The court in Dansker stated:

> The government maintains that any lingering doubts as to the basis of the jury's verdict on Count I are dispelled by its decision on Count II...
>
> We cannot agree. The government's position ignores the fact that the crime of conspiracy is separate and distinct from the related substantive offense. It requires proof of the additional element of an agreement between the alleged co-conspirators. Hence, it is neither illogical nor impossible for a jury to find an alleged conspiracy nonexistent while, at the same time, convicting the de-

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The instant case should be analyzed under similar principles. It is clear that the jury used acts outside the statute as substantive proof of the intent to be influenced. Accordingly, it is clear that those convictions are improper. Wholly lawful acts were used as proof of the offense. This error also rules out the possibility that the conviction on Count Two as it relates to petitioner is reliable.

It bears repeating that there is no fair basis for the Third Circuit's finding that the instructions as a whole imparted a clear impression to the jury that the treasury checks were not governed by Sec. 1954. If that be true, then the persons on the jury were the only individuals at the trial to whom that knowledge was conveyed. The record indicates that neither the prosecutor, defense attorneys nor the trial judge was aware of this distinction. Thus, if we are to assume that the trial judge adequately instructed the

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> fendants of the substantive offenses charged. [537 F.2d at 51]

jury, we must further assume that his instructions were at variance with his comprehension of the scope of Sec. 1954 at the time of trial. The Third Circuit clearly erred in finding that the court did not commit plain error in failing to limit consideration of the treasury checks.

In sum, the error of the court in permitting the government to predicate petitioner's liability on management of funds outside the statute was clearly plain error which produced an unjust and unreliable result.

B. The Trustworthiness Of The Conspiracy And False Statement Convictions Was Also Affected By The Misimpression Of The Jury That Defendant's Legal Acts Of Signing Treasury Checks Were Proscribed By Sec. 1954.

Petitioner was charged in Count One with participation in a racketeering conspiracy. The objects of the conspiracy were repeated violations of Sec. 1954. Petitioner was alleged to have participated in 10 of the 135 acts set forth in the indictment. Five of the ten overt acts alleged against petitioner were deposits by him of funds drawn on the union treasury. As previously noted in Part A, supra, the jury was led to believe that these acts were proscribed by Sec. 1954. To

the extent that it is clear from the analysis set forth above that an injurious effect inhered in this misimpression with respect to deliberations on the choate offenses, it is difficult to maintain that the misimpression did not have an equally deleterious effect on the jury's deliberations as to whether petitioner, in fact, agreed to participate in the conspiracy.

It was conceded below that wholly legal acts may be alleged and proved to constitute an agreement to commit an offense and, therefore, evidence participation in a conspiracy. See, United States v. Taylor, 562 F.2d 1345 (2 Cir. 1977), cert. den. 432 U.S. 909 (1977). Such acts may even constitute acts in furtherance of a conspiracy. See, United States v. Adamo, 534 F.2d 31 (3 Cir. 1976), cert. den. 429 U.S. 841 (1976). The prejudice in the instant case is that otherwise innocuous acts, although probative of an agreement, were mischaracterized as criminal acts both in the indictment and at trial. In the case at bar, were the acts admitted under a proper characterization, limiting instructions would have been appropriate. Where a jury is erroneously

told that if it finds that a defendant engaged in certain acts, a conviction is warranted and that it must assess whether those misclassified "criminal" acts alleged as objects were part of a conspiracy, it is clear that the antecedent error impacts upon any conviction on the conspiracy. The result in **Dansker, supra,** rested on judicial recognition of this principle. Moreover, this error tainted the conviction on the Sec. 1014 charge (false statement) because the error drawing petitioner into the conspiracy fettered the ability of the jury to separate him from the conspiracy's general modus operandi, namely the filing of false loan applications. [7]

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[7] It is instructive to note that the jury in the instant case was deadlocked for a significant portion of the period of deliberations. The deliberations lasted more than three full days. Indeed, the jurors sought clarification of various portions of the instructions, particularly those relating to the Sec. 1954 violations. The court, in response to the jurors' questions, iterated the previous erroneous instructions with no mention of the proper use of the treasury checks. In **Bollenbach v. United States, 326 U.S. 607 (1946),** this Court analyzed the effect of erroneous or unenlightening instructions when repeated in circumstances similar to those at bar. The **Bollenbach** Court stated that special care is indicated in such circumstances. In this regard, this Court

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stated that a conviction may not rest on erroneous direction to the jury on a basic issue. [Id. at 611-613]

POINT II

CERTIORARI SHOULD BE GRANTED TO ESTABLISH THE PARAMETERS OF THE USE OF SPECIAL INTERROGATORIES IN CRIMINAL TRIALS AND TO EXAMINE THE POTENTIAL PITFALLS OF SUCH A PROCEDURE. IN THIS CONTEXT, A RULE SHOULD BE FASHIONED BY THIS COURT CONDEMNING ANY SUBMISSION OF SPECIAL INTERROGATORIES TO A JURY PRIOR TO THE RETURN OF A GENERAL VERDICT.

I

Current Law In The Federal Circuit Concerning The Use Of Special Interrogatories In Criminal Trials

Federal circuit courts are in accord on the general proposition that the use of special interrogatories prior to a general verdict is disfavored in criminal cases. See, United States v. Wilson, supra at ; United States v. Shelton, 588 F.2d 1242, 1251 (9 Cir. 1978); United States v. O'Looney, 544 F.2d 385, 392 (9 Cir. 1976), cert. den. 429 U.S. 1023 (1976); United States v. Munz, 542 F.2d 1382, 1989 (10 Cir. 1976), cert. den. 429 U.S. 1104 (1977); United States v. Jackson, 542 F.2d 403, 412-413 (7 Cir. 1976); Heald v. Mullaney, 505 F.2d 1241, 1245 (1 Cir. 1974), cert. den. 420 U.S. 955 (1974); United States v. Bosch,

505 F.2d 78, 82 (5 Cir. 1974); United States v. Adcock, 447 F.2d 1337, 1338 (2 Cir. 1971), cert. den. 404 U.S. 939 (1971); United States v. James, 432 F.2d 303, 307 (5 Cir. 1970). Cf. United States v. Gallighew, 428 F.2d 760 (2 Cir. 1970).[8]

The use of special interrogatories, although disfavored, does not result in error per se. Federal circuit courts have articulated varying standards of review relative to the use at trial of special interrogatories.[9] Nevertheless,

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Prior to its opinion below, the Third Circuit in United States v. Frezzo Brothers, Inc., 602 F.2d 1123, 1129 (3 Cir. 1979), articulated strong support for this general proposition. In departing from its ruling in Frezzo Brothers, Inc., the Third Circuit stated that in that case it confronted an interrogatory which led the jury in a step-by-step progression to a verdict of guilty. It stated that this concern did not arise in the instant case. This aspect is discussed, infra.

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The Courts have stated: special interrogatories may be submitted in appropriate cases but are generally inappropriate in single count multi-item cases, United States v. Shelton, supra, citing United States v. Bisno, 299 F.2d 711 (9 Cir. 1961), cert. den. 370 U.S. 952 (1962); whether the use of special interrogatories is proper depends upon the "particular circumstances" of the case, United States v. O'Looney, supra; there is a strong policy favoring submission of a general verdict form, United States v. Munz, supra; the use of special interrogatories in any criminal proceeding is suspect not only as a matter of

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these various standards all condemn a special interrogatory, such as that employed in the instant case, which has any tendency to direct a guilty verdict. Where such an effect is found, a reversal is required.

ii

United States v. Spock - The Hallmark Analysis

The analysis set forth in United States v. Spock, 416 F.2d 165 (1 Cir. 1969), as to the effect of a particular special interrogatory, has been adopted by the federal courts for application in ascertaining whether the device undermined the fairness of the trial. The initial factor noted by the Court in Spock was that the special interrogatory used in that case "linked all defendants together." Id. at 180. Having noted that predicate infirmity, the Court pronounced that the ultimate

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sound judicial policy but of due process as well, Heald v. Mullaney, supra; special interrogatories should not be used in criminal trials, United States v. Bosch, supra; special verdicts as to a single count are improper and in and of themselves erroneous. United States v. Adcock, supra; submission of special interrogatories in a criminal case is serious error, United States v. James, supra.

issue is the submission "at all." The Spock Court stated:

> The submission of questions to the jury in civil cases is an everyday occurrence...of substantive importance is the fundamental difference in the jury's functions in civil and criminal cases. In civil trials, the judge, if the evidence is sufficient onesided, may direct the jury to find against the defendant even though the plaintiff entered the case bearing the burden of proof...In a criminal case a court may not order the jury to return a verdict of guilty, no matter how overwhelming the evidence of guilt...[416 F.2d at 180] (emphasis added)

The Spock Court, therefore, began its analysis by distinguishing the roles of juries in civil and criminal cases. Contrary to the procedure in civil cases, there are no circumstances in which a criminal trial judge may direct a verdict of guilty. Therein lies the prohibited effect of a special interrogatory in a criminal trial which, if found, renders the trial constitutionally infirm. In a criminal case, that effect violates the right to trial by jury. United States v. Spock, supra at 181. Cf. Brotherhood of Carpenters v. United States, 330 U.S. 395, 408 (1946). The Spock Court outlined this violation:

> Put simply, the right to be tried by a jury of one's peers finally exacted from the king would be meaningless if the kind's judges could call the turn...In the exercise of its functions not only must the jury be free from direct control in its verdict, but it must be free from judicial pressure, both contemporaneous and subsequent...[416 F.2d at 181]

In short, there would be no right to a trial by jury in a criminal case if the judge was permitted, by use of any procedure, to direct a verdict of guilty.

In this regard, it should be emphasized that in the context of a trial by jury in a criminal case, there are values which transcend systematic application of legal principles promulgated by courts and legislatures. A jury of one's peers interjects the will and spirit of the people into the administration of criminal justice. The value of this component is as highly regarded and jealously guarded as any aspect of the design of a criminal trial in our Anglo-Saxon system of jurisprudence. [10]

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[10] In this context, the Spock Court noted:

> To ask the jury special questions might be said to infringe on its

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A recent opinion of the Sixth Circuit, United States v. Wilson, ____ F.2d ____ (6 Cir. 1980), 27 Cr. L. Rptr. (September 3, 1980) underscores the necessity of adherence to the general principle that special interrogatories should not be submitted to the jury in a criminal trial prior to the return of a general verdict. In Wilson, the Court reversed the defendant's convictions solely on the basis of the use of a special interrogatory. The Wilson Court hinged its analysis of the device on inclusion therein of the word "unanimous." (Slip op. at 6). The defendant in Wilson raised the defense of insanity and the special interrogatory submitted to the jury by the court

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> power to deliberate free from legal fetters; on its power to arrive at a general verdict without having to support it by reasons or by a report of its deliberations; and on its power to follow or not to follow the instructions of the court...any abridgement or modification of this institution would partly restrict its historic function, that of tempering rules of law by common sense brought to bear upon the facts of a specific case. [416 F.2d at 181] (emphasis added).

tracked the guidelines set forth in United States v. Smith, 404 F.2d 720 (6 Cir. 1968), as to instructing a jury concerning the defense of insanity. (Slip op. at 5). The Wilson Court concluded that the language "Do you unanimously find" had the capacity to "easily mislead the jury into believing that unless all 12 found defendant was insane, no one could so find." (Slip op. at 6). The special interrogatory in the view of the court precluded a hung jury. (Slip op. at 6). The Wilson Court predicated its general condemnation of special interrogatories on the danger of the likelihood of confusion and the shifting or weakening of the government's burden of proof and subjection of the jury to direct control of its verdict by judicial pressure. (Slip op. at 6-8). The Wilson Court iterated the principle of Spock that a jury as "the power to follow or not to follow the instructions of the court." (Slip op. at 8). "A jury is entitled to acquit the defendant because it has no sympathy for the government's position." United States v. Wilson, (Slip op. at 8). Stated somewhat differently, "[the jury] has a general veto power, and this power should not

be attenuated by requiring the jury...to explain its reasons." Id. at 9.

A. This Court Should Establish The Parameters Of The Use Of Special Interrogatories In Criminal Trials And Specifically Condemn The Use Thereof Prior To The Return Of A General Verdict.

A review of **Wilson** and the facts in the instant case is illustrative of the need for some statement by this Court as to the viability of the use of special interrogatories in criminal trials, particularly prior to the return of a general verdict. As in **Wilson**, the Third Circuit was required below to analyze with specificity the form of interrogatory submitted by the court to the jury. Although both devices accomplished the same evils, viz. misinstruction of the jury on a critical point of law and possible direction of a verdict of guilty, the device in **Wilson** was condemned and the device in this case condoned. Consistent with the analysis in **Wilson**, there is no viable rationale for submission of a special interrogatory to a jury prior to the return of a general verdict. Such a device of necessity alters the recognized roles of the judge and jury.

Theoretically, a jury which desired to

acquit a criminal defendant despite the instructions on a special interrogatory would place itself in an adversarial position with the court. The court would be required to inquire if it understood the instructions and then question the decision to not follow those instructions. This is a logical concomitant to use of such devices. However, it is clear that in the ordinary case the jury will relent and succumb to direction of its verdict out of fear of confrontation with the court.

Another problem posed by use of such devices, from the viewpoint of criminal defendants, is that such an individual who may be guilty as a matter of law might have profited from the sympathy of the jury. There is little sympathy for the culpable on appeal. It is firmly established that our law in most circumstances, particularly on appellate review, restricts to the greatest extent possible remedies established to protect the rights of the guilty. See, Stone v. Powell, 429 U.S. 465 (1976). The jury is the lone body in our system of criminal justice, other than the President or a state governor, which can free an

individual after the commencement of trial because of passion and understanding for his plight.

What has been said thus far should not suggest that the sole or most important denigration of the jury system caused by special interrogatories is the inability of the jury to be sympathetic. Most importantly, such devices ordinarily obscure the instructions provided by the court or over-emphasize certain aspects of the government's case thereby creating an unfair balance in favor of conviction. This aspect may lead to an unfounded or unreliable conviction.

With respect to submission of such devices subsequent to the return of a general verdict, there is little argument against such usage where it is relevant to an appellate or sentencing issue. United States v. Stassi, 554 F.2d 579 (2 Cir. 1976), cert. den. 430 U.S. 907 (1977). The sole drawback perceived by petitioner is the probable "chilling affect" upon the jury should it be advised prior to its general verdict that it would be required to render a subsequent accounting.

B. The Device Submitted To The Jury Below Resulted In A Violation Of Petitioner's Right To A Trial By Jury

The procedure employed in the instant case was at a minimum as egregious as that which was proscribed by the Court in Spock and more egregious than that in Wilson. The form directed a verdict of guilty and misfocused the jury's attention upon a single element of the offense.

i

Direction Of A Verdict Of Guilty

The defendants were linked together in a single form which described 46 racketeering acts. The jury was instructed to place a written notation as to its finding with respect to each act alleged to have been committed by the particular defendant. Two notations beneath a defendant's name mandated a conviction. "There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step." United States v. Spock, supra at 182. Petitioner was particularly susceptible to prejudice because he was named in only three of the 46 acts. It is incontestable that an unfettered jury might well have sought to distinguish him from the other

defendants.[11] "The jury, as conscience of the community, must be permitted to look at more than logic [and law]." United States v. Spock, supra at 182.[12] The jury in the instant case was directed to a finding of guilty unless it was willing to explain a contrary verdict to the court.

The procedure employed in Spock was condemned even though the jury was instructed that the special interrogatories were to be answered only if a general verdict had been reached. The Spock Court stated it could not be assumed that the jury would scruplously adhere to such chronology. [416 F.2d at 183] The jury in the instant

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11 Defendant Cariello was named in all 46 acts. Defendant Palmieri was named in 45 of the acts.

12 See, United States v. Reicin, 497 F.2d 563, 567 (7 Cir. 1974), where the court noted "the judicially recognized fact that juries frequently convict on some counts but acquit on others, not because they are unconvinced of guilt, but simply because of compassion or compromise." This principle is termed "the jury's historic power of lenity." Id.

case was not instructed to reach a general verdict prior to completing this form. The printed form presented to it was intended to facilitate "a step by step" approach to a finding of guilty on Count Two. "By a progression of questions each of which required an answer unfavorable to defendant, [any] reluctant juror [was] led to vote for a conviction which, in the large, he would have resisted." United States v. Spock, supra at 182. Prior to submitting the forms to the jury, the court stated that its purpose was "to assist the jury in dealing with the complexity of the case." The court specifically instructed the jury to complete the form prior to rendering a general verdict.

ii

The Misfocusing Of The Jury's Attention

The special interrogatory submitted to the jury indicated that receipt, agreement to receive or solicitation of a loan was sufficient to prove an "act of racketeering." The form stated that if the jury credited two of the three allegations against petitioner, namely: (1) solicitation of a loan on behalf of Flen Chestnut; (2) solicitation

of a loan on behalf of Coterie, Inc. and (3) receipt of a loan from the State Bank of Chatham, it had found defendant guilty of the Sec. 1954 offenses which were the predicate offenses necessary to a conviction upon the racketeering count. The second indispensable component of Sec. 1954 was omitted. The jury was not presented on the form with any acts relating to management of Welfare Fund and Severance Fund assets. To sustain a conviction under Sec. 1954 the government was required to prove that petitioner acted "because of or with intent to be influenced" with respect to management of these covered funds. Yet, the special interrogatory failed to require any findings of such intent or any r ationship between the loans and any deposits or other management acts.

Counts Four, Seven and Ten of the indictment charged substantive violation of Sec. 1954. The evidence underpinning those counts mirrored that offered concerning the three acts of rackeeting alleged in Count Two. The jury was not instructed to reach a verdict on these counts prior to considering the law as set forth in the special interrogatory. If the jury followed the instruc-

tions on the form relative to the Sec. 1954 violations set forth in Count Two and credited the allegations (finding that petitioner solicited or received at least two of the three loans), it was required to convict on Counts Four, Seven and Ten, without a specific finding that defendant acted because of or with intent to be influenced. It should be noted that correct oral instructions relative to Count Four, Seven and Ten, as pertinent to the elements under discussion in this point, were provided to the jury. Nonetheless, it cannot be ascertained at this point whether the jury followed those oral instructions, which were to be committed to memory, or those incorporated into the printed form. It is most probable if not a certainty that the jury was influenced to the greatest extent by the form, to which they could refer throughout their deliberations. [13]

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[13] Questions submitted to the court by the jury during its deliberations conclusively establish irreversible confusion. The jury interpreted Sec. 1954 as requiring that

> [W]e must consider the involvement of each defendant separately with respect to their knowledge and participation solely in that

(continued)

13 (continued)

> particular count, under the phrase "receive, agree to receive and solicit."

The inquiry clearly omits the elements of intent. A second inquiry was even more contorted. The jury stated that there existed "a sufficient atmosphere for potential implication of any of the Defendants...relative to their involvement under the phrase "receive, agree to receive and solicit." Significantly, neither inquiry singled out a particular count. The jury was concerned about "several counts" and "certain counts." The jury clearly considered Counts Four, Seven and Ten without pondering the element of intent. That serious unfairness attended the procedure employed is inescapable.

CONCLUSION

For all the foregoing reasons, the writ of certiorari should be granted to review the final judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

By s/S.H.G.

STEVEN H. GIFIS
Attorney for Petitioner-
Joseph Campisano

Of Counsel and On
the Petition
Steven H. Gifis

On The Petition
Alan Dexter Bowman

Dated: January 26, 1981

Appendix

APPENDIX A - OPINION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-2147, 79-2148, 79-2149, 79-2150 and 79-2424

UNITED STATES OF AMERICA

v.

PALMERI, ERNEST P., SR.,
Appellant in No. 79-2147

(D.C. Crim. No. 78-00297-01)

UNITED STATES OF AMERICA

v.

CAMPISANO, JOSEPH,
Appellant in No. 79-2148

(D.C. Crim. No. 78-00297-02)

UNITED STATES OF AMERICA

v.

CARIELLO, VITO,
Appellant in No. 79-2149

(D.C. Crim. No. 78-00297-03)

UNITED STATES OF AMERICA

v.

SMITH, FRANK,
Appellant in No. 79-2150

(D.C. Crim. No. 78-00297-05)

UNITED STATES OF AMERICA

v.

CHESTNUT, FLEN,
Appellant in No. 79-2424

(D.C. Crim. No. 78-00297-04)

APPENDIX A

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued August 5, 1980

Before: ALDISERT and SLOVITER, Circuit Judges,
and HANNUM, District Judge*

(Filed September 3, 1980)

Kenneth Michael Robinson, Esq.
The Judiciary Square
306 Sixth Street, NW
Washington, D.C. 20001
COUNSEL FOR APPELLANTS
PALMERI AND SMITH

Dennis M. Hart, Esq.
The Judiciary Square
306 Sixth Street, NW
Washington, D.C. 20001
COUNSEL FOR APPELLANT
CHESTNUT

Steven H. Gifis, Esq.
68 Bayberry Road
Princeton, N.J. 08540
COUNSEL FOR APPELLANT
CAMPISANO

Fredric J. Gross, Esq.
232 Rhoads Avenue
Haddonfield, N.J. 08033
COUNSEL FOR APPELLANT
CARIELLO

* Honorable John B. Hannum of the United States District Court for the Eastern District of Pennsylvania sitting by designation.

APPENDIX A

Robert J. Del Tufo, Esq.
United States Attorney
Kenneth N. Laptook, Esq.
Asst. United States Attorney
Federal Building
Newark, N.J. 07101
COUNSEL FOR APPELLEE

OPINION OF THE COURT

ALDISERT, Circuit Judge.

These consolidated appeals from a jury verdict of conviction present a number of questions for consideration. The first issue concerns the proper scope of 18 U.S.C. §1954, which proscribes the receipt of kickbacks and other illegitimate benefits by persons associated with employee benefit plans. The second issue is whether the district court failed to distinguish transactions involving money covered by §1954 from transactions involving money not covered by that section. Third, we must determine whether the court erred in submitting special interrogatories to the jury. Finally, we must decide whether the government produced insufficient evidence to

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support each conviction under 18 U.S.C. §§1962(c) and (d), which proscribe transactions and conspiracies related to racketeering enterprises. We hold that the government produced insufficient evidence to support the conviction of appellant Flen Chestnut, and we will therefore reverse his conviction. We resolve all other issues against appellants, however, and the other convictions will therefore be affirmed.

Local 945 of the International Brotherhood of Teamsters, with offices at West Paterson, New Jersey, was an employee organization within the meaning of 18 U.S.C. §1954, and maintained three collective bargaining funds: a Pension Fund; a Welfare Fund, which provided hospitalization and related benefits to the members; and a Severance Fund, which made payments to retired or laid-off workers from individual accounts. The local also maintained a treasury consisting of unearmarked union monies. Both the Welfare Fund and the Severance Fund were "employee welfare bene-

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fit plans" within the meaning of §1954 and were covered by the Welfare Pension Plan Disclosure Act, 29 U.S.C. §§301-09, repealed by Employee Retirement Income Security Act, Pub. L. No. 93-406, §111, 88 Stat. 851, codified at 29 U.S.C. §1031, and the Employee Retirement Income Security Act, 29 U.S.C. §§1001-1381. Each fund was managed by a board of trustees comprised of three management trustees and three union trustees. Joseph Campisano was the President and Vito Cariello the secretary-treasurer of Local 945, and both were union trustees of each fund. Ernest P. Palmeri, Sr., Flen Chestnut, and Frank Smith were business representatives and employees of Local 945.

The government introduced evidence tending to show that in July, 1973, the board of trustees adopted a program of concentrating the assets of the funds into fewer and larger certificates of deposit, thereby maximizing their investment performance. The board vested authority to imple-

ment the program in Cariello. During the ensuing three years, nine area banks received more than $1,200,000 from the union in savings deposits and investments in certificates of deposit, while at the same time extending nearly three quarters of a million dollars in loans to participants in the scheme or their nominees. The banks made little or no effort to collect the loans that they had extended for fear of jeopardizing future deposits or renewals of current deposits by the local.

Under the scheme, Palmeri would contact officers of banks and indicate to them that Local 945 was interested in obtaining certificates of deposits in large face amounts from certain banks. During these conversations and with varying degrees of bluntness, Palmeri would suggest that he or persons close to him were in need of loans. The bank officers, operating on the basis of the implied quid pro quo, would grant the loan with little or no meaningful evaluation of the loan

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application. Soon thereafter, Cariello would contact the officer to inquire about interest rates, and a deposit check on one of the union's funds would promptly arrive bearing Cariello's signature. As the scheme progressed, recipients of the loans began to default, and several of the banks victimized by the scheme experienced severe financial difficulties. In addition, the facade of extending and receiving credit began to give way to the reality of percentage kickbacks.

I.

Many transactions were alleged in the twenty-three count indictment and supported by the government at trial. Although we will not detail each transaction, we will summarize them.

In November, 1973, Alexander Smith, President of the State Bank of Chatham, was introduced to Palmeri. They discussed Palmeri's desire for a loan and Smith's interest in obtaining deposits from Local 945. Palmeri offered to speak

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to Cariello and said that union funds would probably be deposited in the bank. He also indicated that from time to time he would be sending friends into the banks for loans. Palmeri, who was not a customer of the bank, requested and received a $10,000 unsecured loan on the spot. A week later Smith received a telephone call from Cariello who had talked with Palmeri and was ready to deposit $20,000. Smith received the check in December and issued a certificate of deposit to Local 945.

In January, 1974, Palmeri obtained an additional $7,500 unsecured loan from the bank after he promised to speak to Cariello about increasing Local 945's deposits. A few days later, Cariello called requesting interest rate quotations. Smith continued to press Palmeri for additional deposits and in March, 1974, Cariello called again to say that more money would soon be available.

On March 14, Palmeri obtained a $20,000

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loan for his son's business, Elton Fashions. On the next day, the bank received an additional $80,000 check from Local 945. The same month, Smith agreed to lend Palmeri $20,000 for the construction of a restaurant, but only if he came up with four qualified borrowers, each of whom would receive $5,000. The loans were consummated using Campisano, two restaurant employees, and Palmeri's son as the four borrowers. Campisano's application stated that "education" was the purpose of his loan. Campisano and Palmeri later paid off the loan in cash because of Palmeri's uneasiness about Campisano having a loan outstanding from the same bank at which the union kept its funds. Campisano later denied to the FBI and to the grand jury ever having taken out a personal loan at the State Bank of Chatham or having been asked by anyone to do so.

In April, 1974, Palmeri and two officials from other unions threatened to withdraw their union deposits from the State Bank of Chatham

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unless Smith adopted a one hundred percent loans-for-deposits ratio. At that point Cariello and Campisano entered the room and Cariello announced that the union could keep its money in any bank with a competitive interest rate. On the promise of still more union deposits, and with the approval of the bank's board of directors, Smith ultimately agreed to a sixty percent ratio.

Several more loan for deposit transactions followed. The bank extended another loan to Elton Fashions for $15,000, and another to a sister corporation for $15,000. At Palmeri's request, appellant Chestnut received unsecured loans for $7,000 and $4,500, Emily Bonniello received one for $20,000, and appellant Frank Smith a car loan for $3,100. Palmeri also obtained a $5,000 unsecured loan for his brother. Throughout this time, Local 945's original $100,000 CD was continuously renewed, and an additional $100,000 CD was purchased with a check drawn on the Welfare Fund.

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In August, 1974, Palmeri and the same two officials from other unions met with Alexander Smith to demand a two percent kickback on their deposits. Smith acquiesced in this demand. At the next meeting, which Campisano also attended, Frank Rando, one of the other officials, threatened to cooperate with the FBI's investigation of the kickback scheme. Palmeri responded: "[I]f you like breathing you won't even think such things, let alone say them." Campisano echoed the warning: "Frank, he's not kidding. Al [Smith] doesn't know anything. You know too much." Rec. at 2.171.

Alexander Smith testified that these loans were granted because of the loans for deposits arrangement with the union. Shortly after Smith left the State Bank of Chatham in May, 1975, Local 945 and its Welfare Fund redeemed their $100,000 CDs and withdrew their deposits from the bank.

In the spring of 1974, Rando introduced

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Palmeri to Robert Prodan, vice-president and chief operating officer of the Bank of Bloomfield. Rando described his own loans-for-deposits relationship with the bank and Palmeri said that he would attempt to duplicate it. Palmeri went to the bank, stated his intention to obtain deposits from the local, and applied for a $15,000 unsecured loan. Prodan granted this loan on May 31, 1974. On June 21, 1974 the bank received a $100,000 check from the Welfare Fund for the purchase of a six month CD. Although Cariello signed this check, as he did all the Welfare Fund and Severance Fund checks, he never spoke to Prodan about the deposit or its terms. A few weeks later Prodan wrote to Palmeri acknowledging receipt of the money and thanking him. Palmeri called Prodan and insisted that he destroy the letter to prevent anyone from linking him to the union deposits. In July, Palmeri received a second unsecured loan for $10,000 from the Bank of Bloomfield. Four days later, the

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bank received a $100,000 check from Local 945.

The relationship with the Bank of Bloomfield continued with a $20,000 unsecured loan to Chestnut, a $25,000 loan to Philip Amster for the purchase of a restaurant, two $25,000 loans to the restaurant, the first of which Palmeri and George Franconero used to buy out Amster, a $20,000 loan to Emily Boniello and Palmeri's Hotel and Tavern, an installment loan of $5,000 to Palmeri's brother, three unsecured loans totalling $25,000 to Palmeri, a loan for $125,000 to the restaurant in behalf of Palmeri, Campisano, and Franconero, and two unsecured loans totalling $12,500 to appellant Frank Smith. Palmeri also used his influence and the incentive of union deposits to obtain loans for several other persons. Throughout this time, the two certificates of deposit, one drawn on the Welfare Fund and one from the local's general funds, were continuously renewed, and an additional $100,000 deposit from the Welfare Fund was made in June of 1975.

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In August, 1975, Frank Smith met with Prodan's assistant in charge of delinquent loans at the Bloomfield Bank. The bank had requested that three past due loans, one each to Palmeri, Smith, and Chestnut, be renewed and that the interest and some amount of principal be paid. Smith brought in three signed renewal notes and paid the interest up to date on the three loans. When asked if he was prepared to pay some of the principal on the three loans, one of which was his own, Smith replied that he "didn't know anything about it, that Mr. Palmeri took care of it." Smith later denied to the FBI that he knew anyone other than himself who had loans at the Bank of Bloomfield.[1]

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1. In November, 1975 Prodan was asked to resign by the Board of Directors of the Bank. In January, 1976, the Federal Deposit Insurance Corporation closed the bank. The loans from the Bank of Bloomfield set forth the indictment totalled $399,500. As of April, 1979, the outstanding balance on those loans was $388,314.18 plus interest.

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In 1973 Palmeri was introduced to Paul Sheridan of the National Newark and Essex Bank as a man who could direct deposits to the bank. Palmeri promised to help direct union deposits to the bank and also requested and received a $10,000 unsecured loan. Palmeri later received an unsecured loan for $5,000 from the bank. In October, 1973, at Palmeri's request, Sheridan granted a $5,000 loan to Anthony LoParto. On the same day, Cariello drew a $100,000 check on the Welfare Fund for a certificate of deposit at the National Newark and Essex Bank. Palmeri later promised another officer of National Newark and Essex that he would obtain an additional $100,000 CD for the bank. On July 15, 1974, the $100,000 Local 945 Welfare Fund CD was renewed again, and on August 7, 1974, Palmeri received another $10,000 loan. The CD was renewed repeatedly thereafter until mid-1977.

During the summer of 1973 Carl Berger,

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President of the Anthony Wayne Bank, met with a group including Campisano and Palmeri at Local 945, to solicit deposits and indicate his willingness to offer loans to union employees. On September 18, 1973, the bank issued a $20,000 CD to the Local 945 Severance Fund in exchange for its check dated September 11. On October 17, 1973, Berger granted a $5,000 unsecured loan to Palmeri. The loan application that Palmeri had completed and signed showed no outstanding loans even though Palmeri had $15,000 in loans outstanding from the National Newark and Essex Bank. Later that month, Palmeri received a $3,600 auto loan. When Palmeri went to the bank in August 1974 to make a payment on his loans, he told the bank officer that he could assist in directing union funds to the bank.

Berger later met twice with various characters in this drama to seek additional deposits from the local. At both meetings, he received assurances that the local would try to work it

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out. At the second meeting, Campisano called Cariello in and suggested that he give the Anthony Wayne Bank some additional business. In November, 1975, in response to a request by Palmeri, the bank granted Chestnut a $2,705 car loan. Over the opposition of a junior officer, the bank later granted an $8,000 loan to Palmeri, who had refused to submit a financial statement.

In July, 1974, Cariello called the President of the Totowa Savings and Loan Association and asked for a loan in behalf of an unidentified employee. Cariello picked up a blank mortgage application from the bank and a few days later Chestnut, who was seeking the loan, returned it. The bank approved a $46,900 mortgage to Chestnut, whose annual salary was only $19,500. One week after Chestnut's mortgage was approved, the bank received a $20,000 check for deposit drawn on Local 945 and signed by Cariello and Campisano. Two weeks later, it received a $75,000 check drawn on the Local 945 Severance Fund and

co-signed by Cariello.

Palmeri was introduced to Joseph Macula, vice-president of the First National Bank of Piscataway, for the purpose of obtaining a loan. At the time of the introduction Local 945 and the Local 945 Welfare Fund each had a deposit at the bank. In January 1975, the Local 945 Welfare Fund purchased a $40,000 CD. In February, a second $40,000 CD was purchased with a Local 945 check signed by Cariello and Campisano. Each of the CDs was renewed by Cariello prior to June 25, 1975, when Palmeri was granted a $15,000 loan. In connection with the loan Palmeri submitted a financial statement showing no outstanding loans.

In January, 1975, the Local 945 Welfare Fund purchased an $80,000 CD at the American National Bank and Trust Company of New Jersey. Later that month Palmeri went to the bank seeking a $10,000 unsecured loan on the promise that he would obtain additional union funds for de-

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posit. The loan was granted that same day. The financial statement submitted by Palmeri in connection with the loan did not accurately reflect the amount of his outstanding loans at the Bank of Bloomfield, the Anthony Wayne State Bank, or the National Newark and Essex Bank. In the ensuing months the Local 945 Severance Fund purchased a $40,000 CD and the Welfare Fund added $20,000 to its deposit and acquired a $100,000 CD which was serially renewed.

In April, 1976, the Welfare Fund purchased a $100,000 CD at the Mountain Ridge State Bank followed a month later by the Severance Fund's purchase of a $40,000 CD from the bank. In May, Palmeri's son obtained a $60,000 loan on the understanding that Palmeri would direct another $100,000 deposit to the bank. A corporation with which Palmeri's son-in-law was associated obtained a $20,000 loan at the same time. In July and December, 1976, the Local 945 Severance Fund purchased two additional CDs at the

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bank in the amounts of $20,000 and $40,000, thus completing the promised deposit of an additional $100,000.

In June, 1975, John Takacs asked Prodan to help the Springfield State Bank obtain a substantial deposit with which it could purchase discounted leases from Takacs' equipment leasing business. Prodan met with Palmeri and requested a deposit at Springfield State Bank. A few days later Prodan received a telephone call from Vincent Capone who told him the deposit could be arranged but only in exchange for a $1,000 kickback. Takacs sent an envelope containing $1,000 cash to Prodan, who delivered it to Capone. Cariello then issued a $100,000 check on the Local 945 Welfare Fund, Prodan delivered the check to Takacs, and then deposited it at the Springfield State Bank. The bank then issued a CD to the Welfare Fund. Cariello later complained to Prodan that the interest rate on this CD was too low. After Cariello raised the subject again,

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Prodan asked Palmeri to "get this guy off my back." Palmeri reassured Prodan saying, "You got a deal. Don't worry about it."

Appellants were tried before a jury pursuant to a twenty-three count indictment filed October 5, 1978. They were variously charged with soliciting and receiving loans and kickbacks in connection with their association to Local 945's employee benefit plans, with violating and conspiring to violate the federal anti-racketeering statute, and with filing false loan applications.[2] They were convicted and sentenced. On Appeal, they raise several arguments. First, appellants Palmeri, Smith and Chestnut argue that the trial court erred in allowing the case against them to go to the jury because they are not within the class of persons to which the predicate offense, 18 U.S.C. §1954, applies. Second, all appellants

2. We have considered Palmeri's argument that his conviction for filing false loan applications in violation of 18 U.S.C. §1014 is barred by the double jeopardy clause, and find it without merit.

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object to the use of special verdict forms, alleging that these forms led the jury to reach a guilty verdict. Third, all appellants object to the introduction into evidence of transactions involving funds that are not subject to §1954. Finally, each appellant argues that the government's case against him was insufficient as a matter of law to support a jury finding of guilt.

II.

The predicate statute under which each of the appellants was prosecuted is 18 U.S.C. §1954,[3] which provides in relevant part:

> Whoever being -
>
> (1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or

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3. Section 1954 serves not only as a substantive offense, but also serves as a predicate offense for 18 U.S.C. §§1962(c) and (d), which provide: (Cont'd)

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employee pension benefit plan; or

. . .

(3) an officer, counsel, agent or employee of an employee organization any of whose members are covered by such plan;

. . .

receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan...shall be fined not more than $10,000 or imprisoned not more than three years, or both...

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cont'd-

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(cont'd)

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As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any employee welfare benefit plan or employee pension benefit plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974, and

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cont'd

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

To establish a violation of §1954, the government must prove that the defendant served in one of the positions specified in the first part of the statute, and that he solicited or received certain benefits with intent to be influenced in his dealings with the employee benefit plan. Section 1954 was the subject of counts 3-15 of the indictment. If two or more violations of §1954 are established, the defendant becomes subject to §1962 (c), which requires that these two "acts of racketeering" be related to the conduct of the enterprise. See United States v. Elliott, 571 F.2d 880, 899 n.23 (5th Cir.), cert. denied, 439 U.S. 953 (1978). Section 1962(c) was the subject of count two of the indictment. Subsection (d) of §1962 proscribes conspiracies to violate subsection (c) and was the subject of count one of the indictment.

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(b) "employee organization" and "administrator" as defined respectively in sections 3(4) and (3)(16) of the Employee Retirement Income Security Act of 1974.

Palmeri, Smith, and Chestnut assert that the statute is inapplicable to them because they were merely business agents of the union, and thus were not in positions exercising authority to disburse money from the funds. Thus, they did not occupy positions that the statute was intended to regulate. Indeed, they argue, the statute is explicit on this point, requiring that the prohibited actions be taken "with intent to be influenced with respect to, any of his actions, decisions or other duties relating to any question or matter concerning such plan..." This language, in appellants' interpretation, limits the scope of S1954 to persons who by their direct and unassisted actions can exert influence over the benefit plans.

We read the statute differently. The first

clause of S1954 refers to anyone who is "(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan..." Under this provision, these three appellants are within S1954 because they are employees and agents of Local 945. If we read the rest of the statute as appellants ask, however, the only union employees who would be covered are those who are both employees of the union and trustees or administrators of the qualifying funds. This construction would render clause (3) redundant of clause (1), which makes the statute applicable to "(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan..." We should not construe a statute to make it redundant of itself, see Colautti v. Franklin, 439 U.S. 379, 392 (1979); Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307-308 (1961); United States v. DiSantillo, 615 F.2d 128, 135 (3d Cir. 1980), and we

do not do so here.

The more reasonable construction of the statute is one that includes within the regulated class all persons who exercise control, direct or indirect, authorized or unauthorized, over the fund. This accords with the broad purpose of the anti-racketeering statute, 18 U.S.C. §1962, for which §1954 serves as a predicate offense. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, §904, 84 Stat. 941, codified at 18 U.S.C.A. §1961 note (mandating liberal construction); United States v. Forsythe, 560 F.2d 1127, 1135-136 (3d Cir. 1977). It also discourages behavior, like that at issue in this case, that undermines the purpose of the act but is undertaken by persons with no official position with respect to the fund. Thus, we hold that §1954, the predicate statute for the substantive and conspiracy convictions under §1962(c) and (d), applies to appellants Palmeri, Smith and Chestnut.

Appellants cite several decisions as per-

suasive precedent, arguing that they have reached a different result. As support for their argument that the first part of §1954 is a mere "definitional preamble" that does not describe an offense, they cite United States v. Marroso, 250 F.Supp. 27 (E.D.Mich. 1966). From this premise, they conclude that the substantive offense under §1954, and thus the offense on which the §1962 violations must be predicated, is described in the second part of §1954. In further support of their contention that §1954 applies only to persons in a fiduciary relationship to the employee benefit plan, they cite Russo v. United States, 442 F.2d 498 (2d Cir. 1971), cert. denied, 404 U.S. 1023 (1972).

Neither of these decisions supports appellants' position. In Marroso, the district court restricted its holding to the failure of the government to prove the allegations contained in the indictment and bill of particulars. For example, it stated that "[t]he Government by the indictment

and bill of particulars is limited to proving that defendant received the payment while an agent of the Pension Fund. This it has failed to do." 250 F.Supp. at 31. Thus, Marroso not responsive to our analysis of the statute, but instead represents a case in which the government presented an indictment drawn more narrowly than required by the statute. In Russo, the appellant argued that he was neither employed by nor an agent of the employee benefit plan. 442 F.2d at 502. The second circuit rejected this argument, however, holding that the government had established that he "render[ed] advice to the Fund on a regular basis, including giving the Fund advice regarding the financial status of potential borrowers. ..."Id. Thus, Russo was a situation much like this one, in which the appellants had no formal relationship with the plans but exercised sufficient influence over them to come with-

in the proscription of §1954.[4]

III

The second argument for reversal, pressed most vigorously by appellant Campisano but joined also by Palmeri, Smith and Chestnut, is that the government proved its case by reference to transactions that are not proscribed under §1954. Specifically, appellants object to the introduction of evidence regarding deposits from general union treasury funds, which the government now concedes are not "employee benefit plans" for purposes of §1954. Evidence of these transactions went before the jury, appellants contend, with insufficient trial court instruction to distinguish them from transactions that could prove a racketeering offense under §1954.

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4. Appellants also rely on United States v. Porter, 591 F.2d 1048 (5th Cir. 1979), a prosecution under 42 U.S.C. §1395nn(b)(1) for receiving kickbacks in connection with federal medical care programs. We do not find the analogy to this case sufficient to refute our previous analysis of §1954.

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The government argues that the transactions from the treasury fund were admissible as overt acts in furtherance of the conspiracy alleged under §1962(d). We agree that evidence of the transactions was admissible to prove the conspiracy because the overt acts necessary to establish a conspiracy need not themselves be illegal. See Braverman v. United States, 317 U.S. 49, 53 (1942); United States v. Adamo, 534 F.2d 31, 39 n.6 (3d Cir.), cert. denied, 429 U.S. 841 (1976). The more troublesome argument, however, is that the trial judge failed to distinguish these unprohibited transactions sufficiently from the transactions prohibited by §1954.

We reject appellants' argument for two reasons. First, appellants now concede that they made no clear objection to the trial court's instructions relevant to this issue. As one appellant has candidly stated: "The distinction between treasury checks - the only ones signed by appellant Campisano - and covered welfare fund

checks seemed to escape all of the trial participants." Post-argument Brief for Appellant Joseph Campisano at 3. An appellate court is understandably reluctant to reverse a trial court for reasons not presented to it. See Teen-Ed, Inc. v. Kimball International, Inc., 620 F.2d 399, 401 (3d Cir. 1980). Thus, appellants are reduced to arguing that the trial court's instructions were plain error resulting in a manifest denial of justice. Although we will review the arguments on this basis, we note at the outset that our scope of review under this standard is substantially circumscribed. As the Supreme Court noted in Henderson v. Kibbe, 431 U.S. 145, 154 (1977), "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." See Fed. R. Crim. P. 30; United States v. Pennsylvania Refuse Removal Ass'n, 357 F.2d 806, 809 (3d Cir. 1966), cert. denied, 384 U.S. 961 (1966).

APPENDIX A

Whenever an appellate court reviews jury instructions given by the trial court, it must begin from the premise that the instructions must be reviewed as a whole to preserve their context. Cupp v. Naughten, 414 U.S. 141, 146-47 (1973); Ayoub v. Spencer, 550 F.2d 164, 167 (3d Cir.), cert. denied, 432 U.S. 907 (1977). Although at one point in its instructions on §1954 the trial court seemed to fall into the error about which appellants are now concerned,[5] the instruction regarding §1954 consumed fifteen pages of the trial transcript. See Rec. at 12.45 to 12.60. Reading the entire instruction as a whole, we note at least five instances in which the court emphatically distinguished the Welfare and Severance Funds as the two accounts to which §1954

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5. The court stated:

> In order to convict a defendant, you must find that he directly or indirectly received or agreed to receive or solicited a kickback, loan, money or thing of value because of or with the (cont'd)

would apply. Rec. at 12.50; id.; 12.52; 12.55; 12.65 to 12.66. The court carefully cautioned the jury that it could not transfer to appellants the intent of the bankers, who may have offered loans to appellants with intent to obtain deposits from the treasury fund as well as from the Welfare and Severance Funds. By mentioning the treasury funds in this context, however, the trial judge committed no error. Not only did he properly distinguish the funds, but actually aided the appellants by assuring that the jury did not become confused about whose intent would control.

Thus, the jury instructions as a whole fail to demonstrate a manifest denial of justice. The instructions left the jury with a clear impression that only money from the Welfare and Severance Funds was relevant to the §1954 allegations. We

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Cont'd

intent to be influenced with respect to his actions, decisions, or other duties concerning the placing of deposits of the funds of Local 945 or its Welfare or Severance Funds.
Rec. at 12.51 to 12.52.

therefore reject this argument. [6]

IV

Appellants' next argument challenges the use of special interrogatories by the trial court. In essence, they argue that the interrogatories were inherently prejudicial and alternatively that the structure of these interrogatories predetermined the jury's verdict. We find no error in the use of special interrogatories in this complicated criminal case.

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6. Appellant Campisano also notes that Count 1, paragraph 3 of the indictment included use of "the assets of Local 945" as "part of said conspiracy..." Because abuse of the treasury assets is not in itself a crime, appellant argues that the trial court should have stricken paragraph 3 from the indictment. This argument necessarily equates the phrase "part of the conspiracy" with "object of the conspiracy." Although the object of a conspiracy must be illegal, "part of the conspiracy" is better interpreted in this context as a reference to the overt acts taken in furtherance of the conspiracy. This interpretation is confirmed by the trial court's instruction on the conspiracy counts. Rec. at 12.34 to 12.35.

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The first problem with appellants' argument is that this specific objection was not made before the trial court at an appropriate time. At the close of the evidence, the trial court conducted a hearing pursuant to Fed. R. Crim. P. 30 on pending motions and requests for specific jury instructions. At that time counsel for appellants moved to withhold the indictment from the jury during its deliberations in light of the trial court's announced intention to require special interrogatories.[7] After the jury was charged, the parties merely renewed their objections from the prior hearing. The objection to the special

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7. Edward N. Fitzpatrick, Esquire, counsel to appellant Cariello, specifically moved that the indictment not be sent out with the jury:

> I would urge the court that the indictment with its charts and its [schedules] essentially performs the same function that we objected to heretofore, that is that it provides a summation by virtue of a charge for the government....I would not have an objection ....if that chart could be excised. If it cannot be excised, then I would ask the court to exercise its discretion in as much (cont'd)

interrogatories was not raised in post-trial motions for a new trial, most of which in this case dealt with allegations that the government had produced insufficient evidence to sustain the convictions. Thus, the objection regarding the special interrogatories is not properly before us on this appeal.[8]

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cont'd

> as your honor has already indicated that you are going to have a jury form which will give them a score card, which is one of the essential purposes of having them take the indictment with them into the jury room.

Rec. at vol. 10, pt. 2, pp.46-47. Other defense counsel joined the motion, id. at 47-48, which was ultimately denied, id. at 12.80.

8. Because special interrogatories are rarely used in criminal trials, we must draw on our experience with them in civil trials. In civil trials, failure to present a timely objection to the specific wording of the interrogatories results in waiver. Frankel v. Burke's Excavating, Inc., 397 F.2d 167, 170 (3d Cir. 1968). It is not unfair, therefore, to require a criminal defendant to object, at least generally, to their use. Decisions examining jury instructions in criminal trials, a similar problem to interrogatories, also emphasize the need to make a timely objection. Henderson v. Kibbe, (cont'd)

APPENDIX A

Even if it were before us, however, we would hold that the trial judge committed no reversible error. Although special interrogatories are disfavored in criminal trials, see United States v. Frezzo Brothers, Inc., 602 F.2d 1123, 1129 (3d Cir. 1979), cert. denied, ___U.S. __, 48 U.S.L.W. 3535 (Feb. 19, 1980), this court has established no per se rule against them. Indeed, in the second circuit decision on which apppellants principally rely, the court recognized a substantial body of criminal cases in which special interrogatories have been used to protect defendants. See United States v. Spock, 416 F.2d 165, 182 n.41 (1st Cir. 1969).[9] In this case, five defendants were tried on a twenty-three count in-

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cont'd

431 U.S. at 154; United States v. Pennsylvania Refuse Removal Ass'n, 357 F.2d at 803.

9. The court divided these cases into two classes: those in which a specific finding was necessary under the statute for sentencing, and those involving allegations of treason, in which the United States Constitution, art. III, §3, (cont'd)

dictment alleging forty-six acts of racketeering and numerous other violations of federal law. We think special interrogatories were properly employed to decrease the likelihood of juror confusion and to aid the jury in concentrating on each specific defendant, and the charges against him, rather than incriminating one potentially innocent defendant solely on the basis of his association with the others. In addition, the disfavor with which courts view special interrogatories in criminal cases results from interrogatories that lead the jury in a step-by-step progression to a verdict of guilty. See, e.g., Frezzo Brothers, 602 F.2d at 1129; Spock, 416 F.2d at 182. This concern does not arise in this case.

The primary objection raised by appellants is to the special interrogatory relevant to the racketeering allegations in count two of the in-

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cont'd
specifically requires an overt act.

APPENDIX A

dictment. The interrogatory was in the form of a chart listing each defendant across the top and numbered through forty-six on the left side for each allegation of racketeering. A blank space was provided for each defendant to whom the racketeering acts related. Across the top of the form was printed:

> In reaching a verdict on count 2, you must first decide whether or not each defendant committed two or more acts of racketeering. Forty-six acts of racketeering are alleged in the indictment. A space is provided alongside the number corresponding to each act of racketeering alleged in count 2 for you to record your verdict as to each defendant charged with commiting that act. If your verdict is guilty, write "G" in the appropriate space; if not guilty,

APPENDIX A

write "NG."

App. at 72a. That the jury understood the form and was aided by it is demonstrated by their acquittal of Palmeri and Cariello on acts twenty-seven and thirty-nine, and Smith on act thirty-two.

We conclude that the verdict form did not compel the jury to convict the appellants by constructing a chain of findings leading to inevitable conviction. In fact, the jury had to make a full determination of involvement in the acts of racketeering with respect to each defendant. They were fully instructed on the law relevant to this determination. We fail to see how the chart prejudiced the defendants, especially since the second chart required the jury to reach and enter a verdict with respect to each count in the indictment. They jury obviously could look at the chart and note whether or not they had found any defendant guilty of two counts of racketeering, and then enter the appropriate verdict in

the blank provided beside count two. But in a case as complex as this one, we would anticipate the jury to note its prior determinations, even absent special interrogatories, and refer to these notations when reaching a verdict on the racketeering counts. Even if the jury did not use notes, we see no difference between using notes or interrogatories and merely making the determinations on the acts of racketeering and then applying the standards for conviction under §1962(c), the most crucial of which is that the defendant have committed two or more acts of racketeering. We hold, therefore, that, in the circumstances of this case, the trial court did not err in giving the jury special interrogatories to aid it in its deliberations.

V

The final argument presented by each appellant is that the government presented insufficient evidence to support the jury verdicts

of conviction. Our standard of review in examining a claim for insufficient evidence to support a jury verdict is whether "there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision." Burks v. United States, 437 U.S. 1, 17 (1978); see also United States v. Pearlstein, 576 F.2d 531, 534 (3d Cir. 1978). Although the government must establish at least two acts of racketeering to prove a "pattern of racketeering activity" in violation of the statute, see 18 U.S.C. §1962(c); United States v. Frumento, 409 F.Supp. 136, 139 (E.D.Pa. 1976), aff'd 563 F.2d 1083 (3d Cir. 1977), cert. denied sub nom. Millhouse v. United States, 434 U.S. 1072 (1978), it may link a particular defendant to that pattern by producing evidence that shows his knowledge and participation in the scheme. In this case, the government did establish an ongoing pattern of racketeering activity. To obtain convictions, it also had to prove that each defendant was voluntarily

APPENDIX A

connected to that pattern and performed at least two acts in furtherance of it. See United States v. Elliott, 571 F.2d 880, 898-99 (5th Cir.), cert. denied, 439 U.S. 953 (1978). The transactions proved in this case are not illegal by their objective appearance, but become illegal because of the actors' intent. Thus, the evidence necessary to connect the appellants to this scheme is largely composed of circumstantial evidence of their motivations. We conclude that the government presented evidence sufficient to demonstrate repeated participation by every appellant but Chestnut in the pattern of illegal activity.

A.

Although appellant Palmeri places one of his arguments under the rubric of insufficient evidence to sustain his conviction, his argument is actually that §1954, the predicate statute, does not apply to him. For the reasons noted above, we have concluded that §1954 does proscribe abuse of employee benefit plan assets by per-

sons who do not hold a formal position with respect to those plans but who nonetheless exercise real influence over the distribution or investment of their assets. Palmeri does not seriously contend that the evidence connecting him to at least two acts of racketeering and to the conspiracy to engage in the scheme was insufficient to support the jury's verdict. The government's case against him, which might best be characterized as overwhelming, painted him as the hub around whom the entire scheme turned. We will therefore affirm the jury's verdict and the court's sentence against Palmeri.

B.

The primary argument raised by Campisano is that the evidence of his participation in transactions proscribed by §1954 was insufficient to support his conviction. His principal contention is that he was authorized to sign only checks from general funds, not from the employee benefit plans to which §1954 applies, and that the ad-

mission of checks bearing his signature and drawn on the treasury of Local 945 operated substantially to his prejudice. We have previously rejected the argument that the trial court erred in admitting evidence of the treasury fund transactions. We must now determine if the evidence relating Campisano to the conspiracy and to two discrete acts of racketeering was sufficient to allow a reasonable jury to convict him.

The government's case against Campisano included evidence from which a reasonable jury could conclude that Campisano acted with Palmeri in extracting loans from the State Bank of Chatham. Although Campisano could not sign checks issued from the Welfare or Severance Funds, the appearance of his signature on a check drawn on Local 945's general fund, Rec. at 1.194 to 1.195, and his receipt of a loan from the Bank, id. at 2.41 to 2.43, indicate his awareness of the scheme to extract loans for deposits. Because the Welfare Fund made a $100,000 deposit at the bank

APPENDIX A

in August of 1974, the entire pattern of loans for deposits came within §1954. Id. at 2.133. Campisano was also present when Palmeri threatened to kill Rando if he disclosed the scheme to the FBI, and even assured Rando of the credibility of Palmeri's threat. Id. at 2.171.

Similarly, after the Bank of Bloomfield had received a $100,000 check from the Welfare Fund, Campisano joined Palmeri in asking Prodan to grant a loan to Chestnut. Rec. at 4.96 to 4.102. Campisano also had an interest in the restaurant that benefitted from several loans from the Bank of Bloomfield. 4.186 to 4.189. He was present at a meeting with Palmeri and the President of the Anthony Wayne Bank, during which he instructed Cariello to give the bank some additional business. Id. at 7.219. Each of these incidents was supported by sufficient evidence from which the jury could conclude that Campisano was a willing participant in the conspiracy and committed these acts in violation of §1954. We con-

clude, therefore, that Campisano's conviction and sentence will be affirmed.

C.

Appellant Frank Smith presents a somewhat closer case than Campisano or Palmeri. The prosecution's evidence tended to show that Smith received a $3,100 automobile loan from the State Bank of Chatham, id. at 3.114, a $2,500 unsecured loan from the Bank of Bloomfield, id. at 4.168 to 4.170, and a $10,000 unsecured loan from the Bank of Bloomfield, id. at 4.180 to 4.182, each of which occurred during times of deposit activity from the Welfare and Severance Funds. Although this evidence alone would be insufficient to sustain Smith's conviction, he deposited the proceeds of the $10,000 loan into Palmeri's account the day he received the loan. Id. at 4.180 to 4.182, 7.40 to 7.41. In addition, when he entered the Bank of Bloomfield to make payments on three outstanding loans, one of which was in his name, he stated that he "didn't know

anything about it, [and] that Mr. Palmeri took care of it." Id. at 7.41 to 7.42, 7.67 to 7.68. From these incidents, the jury could conclude that Smith was knowingly participating in the conspiracy. By accepting three loans pursuant to the scheme, he committed the requisite acts of racketeering for purposes of §1962(c). His conviction will therefore be affirmed.

D.

Unlike Campisano and the other defendants, Cariello received no personal loans under the scheme. Nevertheless, the evidence presented by the government concerning Cariello's contacts with Totowa Savings and Loan Association regarding a mortgage loan to Chestnut was sufficient for a resonable jury to infer Cariello's knowledge of and participation in the scheme. Cariello telephoned the bank, asked for a loan application for an employee of the union for whom he wanted to obtain a mortgage, picked up the application, and Chestnut returned it a week later. Id. at

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8.204 to 8.206, 8.214 to 8.215. The bank subsequently approved a $46,900 mortgage for appellant Chestnut, whose annual salary was only $19,500. Id. at 8.214 to 8.215. Eight days after Totowa approved the Chestnut mortgage, it received a check for deposit drawn on Local 945 and signed by Cariello and appellant Campisano. Id. at 8.218 to 8.220. Two months later, it received another deposit check for $75,000, signed by Cariello and drawn on the Local 945 Severance Fund. Id. Having established his knowledge of the scheme, the government's proof that Cariello's signature appeared on each of the deposit checks, if believed, could support an inference of his intimate involvement.

Cariello attempts to negate this inference by arguing that he was charged by the board of trustees with the placement of the Funds' assets, and that he was influenced only by prevailing interest rates in determining where to purchase certificates of deposit. In light of the evidence

of a link between Cariello and the scheme, we need only note that the jury listened to this argument and rejected it. Further refutation of Cariello's assertion that he relied solely on interest rates in placing the funds comes from testimony recounting statements by Cariello to Robert Prodan, vice-president of the Bank of Bloomfield, who was implicated as the intermediary for several of the illegal transactions. Cariello indicated his concern that certain deposits at the Springfield State Bank were drawing inadequate interest. Id. at 5.55. Prodan in turn asked Palmeri to "get this guy [Cariello] off my back, " and Palmeri assured him "You got a deal. Don't worry about it." Id. at 5.56. A jury could reasonably infer, taking this evidence together with the evidence previously mentioned, that Cariello was not actually placing the money with the institution offering the highest interest rate, but instead was participating in the kickback scheme. His concern about the low rates could

merely indicate a concern that money for which he was most directly responsible was being too obviously misused, thus subjecting him, more than other participants in the scheme, to criminal investigation. All this evidence, taken together and in the light most favorable to the government, supports Cariello's conviction under §§1962(c) and 1954. This evidence is also sufficient to support an inference of Cariello's participation in a kickback conspiracy in violation of §1962(d).

E.

Appellant Chestnut seems to have been a major beneficiary of the loans for deposits scheme. The government introduced evidence at trial tending to prove that Chestnut received over $80,000 in loans, a large part of which were unsecured, from four different banks. During the relevant time, Chestnut was a business agent for the union with an annual salary of $19,500. Id. at 8.214 to 8.215. The prosecution's evidence in-

dicated that Chestnut knew he would be unable to repay the loans when he obtained them, id. 4.11 to 4.15, that he obtained them not on the basis of his financial ability but because of his position with the union, id. at 4.23 to 4.24, and that he failed to disclose prior loans when he applied for additional loans, id. at 4.103 to 4.104, 7.200 to 7.201. Chestnut obtained one unsecured loan from the State Bank of Chatham immediately after appellant Palmeri, introduced him to Alexander Smith, president of the bank. Id. at 2.88 to 2.92. But at this point the government's case against Chestnut stops. It submitted no evidence tending to prove Chestnut's knowledge or participation in the scheme. That he benefitted from the loans for deposits plan is clear; what is unclear is his knowing participation in it. He cannot be held liable if, for instance, he received the loans merely because the principals in the scheme liked him or thought he needed money. Only if he knew the true basis for the

APPENDIX A

loans, and participated in the plan, has he run afoul of §1954 and thus §1962. The government simply failed to provide that connection. Accordingly, Chestnut's conviction will be reversed on both the substantive and conspiracy counts.

VI.

Accordingly, the verdicts against Palmeri in No. 79-2147, Campisano in No. 79-2148, Cariello in No. 79-2149, and Smith in No. 79-2150, will be affirmed. The conviction of Chestnut in No. 79-2424 will be reversed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
For the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-2147, 79-2148, 79-2149, 79-2150
and 79-2424

UNITED STATES OF AMERICA

vs.

PALMERI, ERNEST P. SR.,

Appellant in No. 79-2147

(D.C. Crim. No. 78-00297-01)

UNITED STATES OF AMERICA

vs.

CAMPISANO, JOSEPH,

Appellant in No. 79-2148

(D.C. Crim. No. 78-00297-02)

UNITED STATES OF AMERICA

vs.

CARIELLO, VITO,

Appellant in No. 79-2149

(D.C. Crim. No. 78-00297-03)

UNITED STATES OF AMERICA

vs.

SMITH, FRANK,

Appellant in No. 79-2150

(D.C. Crim. No. 78-00297-05)

APPENDIX B

UNITED STATES OF AMERICA

vs.

CHESTNUT, FLEN,

Appellant in No. 79-2424

(D.C. Crim. No. 78-00297-04)

Appeal from the United States District Court
for the District of New Jersey

Present: ALDISERT and SLOVITER, Circuit Judges
and HANNUM, District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on August 5, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court filed July 23, 1979, and appealed at Nos. 79-2147, 79-2148, 79-2149 and 79-2150, be, and the same are hereby

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*Honorable John B. Hannum, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX B

affirmed; the said judgment of the District Court appealed at No. 79-2424 be, and the same is hereby reversed, all of the foregoing in accordance with the opinion of this Court.

ATTEST:

s/B.J.R.

Betty J. Robinson
Deputy Clerk

September 3, 1980

Certified as a true copy and issued in lieu of a formal mandate as to Nos. 79-2147, 79-2148 and 79-2150, on November 4, 1980.

Test: SALLY MRVOS
Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 79-2148

UNITED STATES OF AMERICA

vs.

CAMPISANO, JOSEPH, Appellant
(D.C. Crim. No. 78-00297-02)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, Circuit Judges, and HANNUM, District Judge.*

The Petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service,

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*Honorable John B. Hannum, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX C

and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/Judge Aldisert
JUDGE ALDISERT

Dated: October 27, 1980

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-519

JOSEPH CAMPISANO,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner, IT IS ORDERED that the time for filing a petition of writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 25, 1981.

/s/William J. Brennan, Jr.

Associate Justice of the
Supreme Court of the
United States

Dated this 15
day of December, 1980.

APPENDIX E

18 U.S.C.A. §1954

Offer, acceptance, or solicitation to influence operations of employee benefit plan

Whoever being -

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly

APPENDIX E

or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned not more than three years, or both: Provided, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any employee welfare benefit plan or employee pension benefit plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974, and (b) "employee organization" and "ad-

APPENDIX E

ministrator" as defined respectively in sections 3(4) and (3)(16) of the Employee Retirement Income Security Act of 1974.

Amend. 6 CONSTITUTION

AMENDMENT VI-JURY TRIAL FOR CRIMES AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

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